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No. 388

In the Supreme Court of the United States

OCTOBER TERM, 1955

GENERAL ELEC. CO., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 383

GENERAL BOX COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals is reported at 224 F. 2d 7. The opinion of the district court denying the Government's motion to dismiss (R. 60–63) is reported at 94 F. Supp. 441. The court's opinion after the first trial (R. 318–337) is reported at 107 F. Supp. 981. The final opinion following a new trial (R. 343–351) is reported at 119 F. Supp. 749.

JURISDICTION

The judgment of the court of appeals was entered on June 17, 1955 (224 F. 2d 7). A petition for rehearing was denied on August 5,

1955 (224 F. 2d 7), and the petition for a writ of certiorari was filed on September 12, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the United States is liable for the value of timber which it cleared from a right of way in enlarging a levee along the Mississippi River where the right of way had been donated to the United States by a Louisiana Levee Board after it exercised, without notice to the owner of the timber, the state's servitude to use such property without compensation.

STATUTES INVOLVED

The pertinent portions of the Federal Flood Control Act of May 15, 1928, as amended, 33 U. S. C. 702a–12(d), 702b and 702c; Article 16, Sections 5 and 6, of the 1921 Louisiana Constitution; Articles 455 and 665 of the Louisiana Civil Code; and Act No. 188, Acts of 1904, La. Rev. Stats. 9: 1103, are printed at pages 24–27 of Petitioner's Appendix.

Article 465 of the Louisiana Civil Code; Act No. 75, Acts of 1940, La. Rev. Stats. 52:2; and Act No. 76, Acts of 1938, La. Gen. Stats. 6869.3, are printed as an Appendix, *infra*, pp. 14–15.

STATEMENT

Petitioner instituted these two suits under the Tucker Act, 28 U. S. C. 1346 (a) (2), to recover

the value of timber cleared from two tracts of land by contractors of the United States in the enlargement of an existing levee on the main stem of the Mississippi River in Louisiana. The sum of $9,000 was demanded in each case. A total of 260 acres of timber lying between the old levee and the river had been removed. Petitioner owned the timber only. The two cases were consolidated for trial. The material facts are as follows:

The project was undertaken pursuant to the provisions of the Federal Flood Control Act of May 15, 1928, 45 Stat. 534, as amended, 33 U. S. C. 702a, *et seq.* Section 702c of that Act (Pet. App. 24–25) provides that the state shall "provide without cost to the United States, all rights-of-way for levee foundations and levees on the main stem of the Mississippi River." Acting under that provision, the Corps of Engineers, United States Army, submitted its plans to the Board of Commissioners of the Fifth Louisiana Levee District, which is the state agency charged with effectuating the foregoing provision in the area involved here, and requested the necessary rights of way (R. 328; Exhibits G–3, G–4). The President of the Levee Board replied granting the rights of way and his action was approved by the Board (R. 329, 330; Exhibits G–5, G–7). That action by the Levee Board was in the exercise of the servitude for levee purposes which the state of Louisiana has in all lands riparian to navigable rivers.

Thereafter, private contractors employed by the United States commenced clearing the land. Petitioner was not notified and did not learn of the work until after the destruction of its timber had begun. When the contractors were asked by petitioner to discontinue and allow it to cut the timber which remained, the request was refused because the contractors' bids had been made on the basis of bulldozing the standing timber. This was a substantially less expensive method than removing the stumps which petitioner's salvaging operation would leave. (R. 261, 264, 286.) Their contracts with the United States authorized pushing the trees over and out of the area (Exhibits P–6, P–7).

Petitioner than instituted these actions against the United States to recover the value of the timber (R. 5, 86). The United States filed third party complaints bringing in the Levee Board as a defendant (R. 64–67, 96–99). It also moved to dismiss petitioner's complaints as not stating claims upon which relief could be granted, but this was denied (R. 55, 60, 94; 94 F. Supp. 441).

Following a trial, the district court held that the state's servitude was not effectively exercised "without any notice or formal procedure whatever" so that the United States was liable in civil trespass, but that it could recover over against the Levee Board because of the latter's obligation to furnish the rights of way (R. 318–337; 107 F. Supp. 981). On motion for a new trial by the

United States and the Levee Board, further proceedings were had after which the court held that the United States was liable under the Fifth Amendment and could not recover from the Levee Board because of its failure to require an effective appropriation and because it "would be compelled" under Section 702a–12 (d), 33 U. S. C., of the Federal Flood Control Act (Pet. App. 24) to "reimburse local authorities for actual expenditures found by the Chief of Engineers to be reasonable * * * for future setbacks of mainline Mississippi River levees" (R. 343–351; 119 F. Supp. 749). Accordingly, the court dismissed the suits as to the Levee Board and entered judgment against the United States in the total sum of $10,801 (R. 352–353). Interest was allowed at four percent from the date of judgment to 30 days after approval of any appropriation act providing for payment.

The United States appealed on the merits and petitioner appealed for allowance of a larger interest award (R. 354, 357). The court of appeals reversed, one judge dissenting, with directions to enter judgment for the United States (224 F. 2d 7). It held that petitioner's timber was subject to the servitude of use by the state for levee purposes without compensation and that notice and a hearing were not required for the state to exercise a public right which it owned, so that the servitude was correctly exercised by the Levee Board for itself and for the United States.

ARGUMENT

Petitioner contends that the decision of the court of appeals misconstrues the law of the State of Louisiana (Pet. 11–18) and denies due process (Pet. 18–23). Both contentions are based on the court's approval of the exercise of the servitude for levee purposes without according notice to petitioner and an opportunity to salvage the timber. But that ground ignores the plain and constitutional distinction in Louisiana law between appropriation, which is the right in the state to use a property interest which it owns, and expropriation, which is the taking or use of property in which it has no right or interest. The taking here was an appropriation.

Petitioner concedes the existence of the servitude in behalf of the state (Pet. 11, 15), but limits its scope and legal force. The limitation is not warranted. From earliest times in Louisiana, the owner of property bordering upon a navigable stream has been required to give, without compensation, so much thereof as might be needed for the construction of levees. *Wolfe* v. *Hurley*, 46 F. 2d 515 (W. D. La.), affirmed *per curiam*, 283 U. S. 801; *Peart* v. *Meeker*, 45 La. Ann. 421, 12 So. 490; Articles 455 and 665, Louisiana Civil Code. Such property "never passes free of this reservation to a purchaser" and the purchaser takes "knowingly." *Eldridge* v. *Trezevant*, 160 U. S. 452; *Mayor of Vidalia* v. *McNeely*, 274 U. S. 676, 684. The servitude includes all property

"which is within range of the reasonable necessity of the situation as produced by the forces of nature." *Hart* v. *Board Of Levee Com'rs,* 54 Fed. 559 (C. C. E. D. La.); *Board of Com'rs of Tensas Basin Levee District* v. *Franklin,* 219 La. 859, 867, 54 So. 2d 125, appeal dismissed, 342 U. S. 844, on authority of *Eldridge* v. *Trezevant, supra,* and *Wolfe* v. *Hurley, supra.* Property owners must "accommodate themselves to the change, as much so as if such change had been occasioned by the sudden caving of the banks of the river above." *Police Jury of West Baton Rouge* v. *Bozman,* 11 La. Ann. 94. "This rule, of course, antedates both the federal and state Constitutions, and was recognized as coexistent with those principles which were subsequently embraced in the written provisions of the Fifth Amendment to the Federal Constitution and the Bill of Rights, or what is now section 2 of article 1 of the state Constitution 1921; hence the latter were adopted subject thereto." *Wolfe* v. *Hurley, supra,* p. 520.

The right of free use of the servitude was relinquished in part by Article 16, Section 6, of the Louisiana Constitution of 1921 (Pet. App. 26). It provides that "Lands and improvements thereon hereafter actually used or destroyed for levees or levee drainage purposes * * * shall be paid for at a price not to exceed the assessed value for the preceding year; provided that this shall not apply to batture * * *." Petitioner

concedes that its timber was on batture (Pet. 15).

The phrase "Lands and improvements thereon" used in the 1921 Louisiana Constitution to define the property subject to the servitude is broad enough in terms to include growing trees. Moreover, Article 465, Louisiana Civil Code, *infra*, p. 14, specifically provides that: "Standing crops * * * and trees before they are cut down * * * are considered as part of the land to which they are attached." There is no recovery for standing crops which are destroyed in the construction of a levee. *Lacour* v. *Red River, Atchafalaya & Bayou Boeuf Levee Dist.*, 158 La. 737, 104 So. 636; *Weeks* v. *Nineteenth Louisiana Levee Dist.*, 165 So. 491 (C. A. La.); *Scott* v. *Red River-Bayou Pierre Levee Dist.*, 7 So. 2d 429 (C. A. La.). It follows that growing trees are equally within the servitude.

The servitude was correctly exercised by the Levee Board for itself and for the United States. The Federal Flood Control Act of May 15, 1928, 45 Stat. 535, 33 U. S. C. 702c (Pet. App. 24–25), requires "the States or levee districts" to give "assurances satisfactory to the Secretary of the Army that they will * * * (c) provide without cost to the United States, all rights-of-way for levee foundations and levees on the main stem of the Mississippi River * * *."[1] Cf. 33 U. S. C.

[1] Petitioner's reference (Pet. 19, footnote 21; Pet. App. 24) to 33 U. S. C. 702a–12(d), which provides for reimbursement of local authorities by the United States for ex-

701c, 702a–9, 702a–12(e). Article 16, Section 5, of the 1921 Louisiana Constitution (Pet. App. 26), authorizes the Levee Districts "to cooperate with the Federal Government in the construction and maintenance of levees in this State, on such terms and conditions as may be provided by the Federal authorities and accepted by the State authorities." By Act No. 75, Acts of 1940, La. Rev. Stats. 52:2, and Act No. 76, Acts of 1938, La. Gen. Stats. 6869.3, *infra*, pp. 14–15, the Levee Boards "may donate or convey to the United States any lands, movable or immovable property, rights of way, or servitudes which they may own or acquire, for use by the United States in connection with * * * (3) Flood control works." The Board of Commissioners of the Fifth Louisiana Levee District exercised its servitude and donated the necessary rights of way on this particular property to the United States under those statutes.[2]

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penditures "for future setbacks of main-line, Mississippi River levees," is not applicable here. This is an enlargement of an existing levee, not a setback. Also, contrary to the statement in that footnote, the Government's engineer testified that the United States does not pay for rights of way involved in enlargement of levees (R. 309–310).

[2] The Board pledged itself by resolutions of May 16, 1928, and June 16, 1929, to "provide without cost to the United States all rights of way for levee foundations and levees on the main stem of the Mississippi River" (R. 326–327; Exhibits G–1, G–2). By resolution of September 12, 1945, the Board authorized its President "to grant rights of way where the need is immediate, the proper right of way resolution to be passed in the regular manner at the following Board meeting" (R. 329; Exhibit G–6). By letters of May 19, 1947, and

Thus, the United States acquired the right to remove the timber by a valid legal transaction between it and the Levee Board, not through the exercise of its power of eminent domain.[3] *Danziger* v. *United States*, 93 F. Supp. 70 (E. D.

June 10, 1947, the District Engineer, Corps of Engineers, United States Army, advised the Levee Board of the proposed enlargement of the levee, enclosed the plans which included this particular property, and requested "a formal statement by your Board that rights-of-way are available for the construction of the enlargement and granting the United States a right of entry to prosecute the work. This statement may be in the form of a letter signed by the President of the Board" (R. 328; Exhibits G–3, G–4). Referring to the request for a "formal statement * * * that rights-of-way are available," the President of the Levee Board replied on June 12, 1947, that "The Board of Commissioners of the Fifth Louisiana Levee District are hereby glad to comply with your request and render you any assistance possible" (R. 329, Exhibit G–5).

The Board ratified the action of the President at its meeting of July 9, 1947, when the letter by the President to the Corps of Engineers was read and no objections were made. The minutes show that the Board considered that the letter "complied with" the request of the Engineers (R. 330; Exhibit G–7). Subsequent actions and inactions of the Board, as evidenced by the correspondence between the Board and the Corps of Engineers, also show conclusively that the Board had authorized the use of the rights-of-way servitude by the Corps of Engineers (Exhibits G–8 through G–13).

[3] If compensation were owed by the United States under the theory that the servitude was not properly exercised, it appears that it would be entitled to judgment over against the state Levee Board. Moreover, the timber, being on land which was overflowed "almost every year" (R. 212–213, 280–295), was located below ordinary high water mark and hence within the federal navigation servitude. *United States* v. *Chicago, M., St. P. & P. R. Co.*, 312 U. S. 592.

La.); *Bruyn* v. *Nelson Bros.*, 180 La. 760, 157 So. 585.

The procedure which due process might require for an expropriation of private property is not necessary to the exercise of this servitude. *Hart* v. *Board of Levee Com'rs*, 54 Fed. 599 (E. D. La.); *Peart* v. *Meeker*, 45 La. Ann. 421, 12 So. 490. As the court said in *Board of Com'rs of Tensas Basin Levee District* v. *Franklin*, 219 La. 859, 869–870, 54 So. 2d 125, appeal dismissed, 342 U. S. 844, on authority of *Eldridge* v. *Trezevant*, 160 U. S. 452, and *Wolfe* v. *Hurley*, 283 U. S. 801:

> Despite the repeated contention in numerous litigations that Article 665, imposing this servitude on riparian lands, controverts the constitutional guarantee in both the state and federal Constitutions that no one can be deprived of his inalienable rights of property *without due process of law*, it has been consistently held by this court and by the Supreme Court of the United States that such constitutional requirements relate to the right of expropriation and do not have the effect of abrogating our law giving the state authority to appropriate land upon which rights for the construction of levees, roads, and other such public works have always been reserved. [Emphasis supplied.]

There is "no formal procedure which the levee districts must follow in appropriating property." *Danziger* v. *United States*, 93 F. Supp 70, 72, (E.

D. La.); *Pruyn* v. *Nelson Bros.*, 180 La. 760, 157 So. 585; *Dickson* v. *Board of Com'rs of Caddo Levee District*, 210 La. 121, 26 So. 2d 474. That rule embraces the giving of notice, because when notice is required the state provides for it specifically: *Board of Com'rs* v. *Trouille*, 212 La. 152, 31 So. 2d 700.

Petitioner's reliance on statements in *Pruyn* v. *Nelson Bros.*, *supra*, and *Peart* v. *Meeker*, *supra*, to establish "oppression and injustice" in the lack of notice here (Pet. 14) is unavailing, because those statements relate to "reasonableness of use" of the servitude, not to procedure. The only suggestion in this case as to "reasonableness of use" is that the timber was not actually used in the construction of the levee. The timber had to be removed in order to clear the land. It was pushed over, and thus destroyed, by bulldozers "in the usual manner" because the contractors' bids were substantially reduced "on the basis of that method of removing the timber" as opposed to removing stumps which would have been left by a salvage operation (R. 286, 297, 345). The destruction was, therefore, not unreasonable because the "cost of public projects is a relevant element in all of them, and the Government, just as anyone else, is not required to proceed oblivious to elements of cost." *United States ex rel T. V. A.* v. *Welch*, 327 U. S. 546, 554; *Old Dominion Co.* v. *United States*, 269 U. S.

55; *Board of Levee Com'rs* v. *Kelly*, 225 La. 411, 73 So. 2d 301.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1955.

APPENDIX

Article 465 of the Louisiana Civil Code provides:

> *Crops, fruits and trees.*—Standing crops and the fruits of trees not gathered, and trees before they are cut down, are likewise immovable, and are considered as part of the land to which they are attached.
>
> As soon as the crop is cut, and the fruits gathered, or the trees cut down, although not yet carried off, they are movables.
>
> If a part only of the crop be cut down, that part only is movable.

Act No. 75, Acts of 1940, La. Rev. Stats. 52:2, provides:

> *Donations to United States for certain purposes; officers making donations.*
>
> The state or any state agency or subdivision may donate or convey to the United States any lands, movable or immovable property, rights of way, or servitudes which they may own or acquire, for use by the United States in connection with:
>
> (1) The improvement and maintenance of the navigation of natural waterways;
>
> (2) The construction, improvement, and maintenance of artificial navigable waterways, river and harbor works;
>
> (3) Flood control works;
>
> (4) Airports, flying fields, landing fields, parks, forest preserves, canals, irrigation districts, hospitals, agricultural experiment and research stations, military posts and for any military purposes.

> In the case of property owned by Louisiana or any state, branch or agency, the transfer or conveyance shall be performed by the governor with the consent and approval of the lieutenant governor or the attorney general. The commission council or other governing body of a municipality shall transfer or convey property owned by a municipality. In the case of a parish the parish governing authority shall transfer or convey the property and in the case of any other subdivision of the state the governing body shall transfer the property.

Act No. 76, Acts of 1938, La. Gen. Stats. 6869.3, provides:

> *Declaration of policy.*—All levee districts in the state of Louisiana heretofore or hereafter created, are hereby declared to be political subdivisions and agencies of the state of Louisiana, and such levee districts and the boards of commissioners thereof were created and exist and hold and enjoy lands and all rights to said lands, property and property rights in furtherance of a public purpose, and this statute is enacted as an exercise of the state's reserved police power.